

Interpretation of ‘Public Morals’ under Article XX of the GATT

Ms. Nargis Yeasmeen

(LL.B, LL.M - West Bengal, National University of Juridical Sciences, Kolkata)

Abstract: *In the present position where trade is in the emerging stage, there the relationship between free trade and morality is no doubt a significant issue. This free trade and morality co-exist in a precarious balance. However finding a proper balance between the two notions is an arduous task. Article XX of the GATT reflects an exhaustive list of exceptions to the basic GATT obligation, which is designed to provide the member states with flexibility in regulating the sensitive areas like protection of public morals, of human, animal or plant life or health. A broad interpretation of this clause might trigger excessive invocation of this exception which may defeat the ultimate purpose of the GATT and a narrow interpretation may pose a threat to the national sovereignty of the member states. Thus, the challenge is to find an apt interpretation of the term ‘public morals’. The researcher explains in details the Vienna Convention on the Law of Treaties which provides rules for treaty interpretation. She further explains the US-Gambling case which addresses the issue of ‘public moral’ for the first time, but it left many questions unanswered. She also explains China Audio-Visual Case which clarified the ambiguities that lingered after the US-Gambling case. Lastly, a difference between public morals and public order is laid down. The main objective of this research work is to discover the possible interpretation of the phrase ‘public morals’ as provided under Article XX (a) of the GATT, with the help of the rules of interpretation and judicial clarification by US-Gambling Case and China Audio-Visual Case. The researcher adopted a Doctrinal Method, Historical Research Method, Comparative Method and Analytical Method Approach for a thorough understanding of the subject.*

I. Introduction:

In the present era of emerging trade, the relationship between free trade and public morality is undoubtedly a significant issue. In the international economic system, there exists constant conflict between freedom of trade and idea of morality.¹ Free trade and public morality co-exist in a precarious balance. On one hand, the system is founded on the notion that trade between states should not be stalled by the religious or geo-political beliefs of the country, on the other hand the trade proponents are of the view that states should be allowed to take all measures that are required to defend their public morality.² However, finding proper balance between these two notions is an arduous task, as there remains every possibility of states resorting to illegal protectionism under the semblance of defending the morality of the state.³ In spite of the broad obligation to the liberalisation of trade in goods and services, the member states of World Trade Organisation (WTO) have been empowered with the legal authority to digress from the basic obligations of General Agreement on Tariff and Trade (GATT) and General Agreement on Trade in Services (GATS) by invoking the general exceptions provided under Article XX of The GATT and Article XIV of the GATS.⁴ Article XX of the GATT reflects an exhaustive list of exceptions to the basic GATT obligations. This ‘laundry list’ which consists of ten general exceptions are designed to provide the member states with flexibility in regulating the sensitive areas like protection of human, animal or plant life or health; conservation of natural resources and protection of public morals.⁵ Article XX (a) of the GATT, specifically provides that a state may restrict trade by taking such measures which are necessary to protect public morals. However, in order to justify the invocation of public moral exception clause, the requirement imposed by the opening clause of the Article i.e. the ‘Chapeau’ obligates the member states not to

¹ Tyler M. Smith, Much Needed Reform in the Realm of Public Morals : A Proposed Addition to the GATT Article XX(a) “Public Morals” Framework, Resulting from China Audio Visual, 19 CARDOZO J. OF INT’L & COMP. LAW 734 (2001)

² Mark Wu, Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine, 33 THE YALE JOURNAL OF INTERNATIONAL LAW 215 (2008)

³ SMITH, 734

⁴ Jeremy C. Marwell, Trade and Morality: The WTO Public Morals Exception After Gambling, 81 NEW YORK UNIVERSITY LAW REVIEW 802 (2006)

⁵ Christopher Doyle, Gimme Shelter : The “Necessary” Element of GATT Article XX in the Context of the China-Audio Visual Products Case, 29 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 144 (2001)

apply the exceptions listed in paragraph (a) to (j) of the Article arbitrarily or unjustifiably resulting in discrimination between those countries where same conditions prevail and that the measures does not amount to 'disguised restrictions on the international trade'. The WTO Appellate Body (AB) in the US- Gasoline Case⁶ observed that the WTO member invoking defence under the Article XX must first prove that the measure in question qualifies under one or more of the itemized exception and then the measure must also suffice the requirements of the chapeau. Thus, the Appellate body in this case laid down a two-tiered analysis – First, provisional justification by qualifying under one or other heads of the exception, and second, further satisfaction of the requirements of the introductory clause of Article XX.⁷

However, some are of the view that public moral clause is a vehicle for incorporating human rights, women rights and labour standards into the WTO and giving practical effect to these norms through the WTO economic sanction. But a broad public moral exception could potentially serve as shelter for protectionism, vitiating the relatively robust doctrines that now govern environmental and human health regulations and undermining the WTO's substantial progress towards trade liberalisation. As such the Appellate Body has described the general exception clause as striking a balance between the rights of a Member State to regulate in the enumerated areas (e.g., public morals, health, and environment) and the obligations not to interfere with the free flow of goods and services. Several trends suggest that public morals exception will play an increasingly important role in international trade relationships within and outside of WTO.

II. Interpretation According To The Vienna Convention On The Law Of Treaties, 1969

With more and more states invoking the public moral exception clause the lack of a proper interpretation of this clause is really problematic.⁸ The status of the General Rule Interpretation provided under Article 31 of the Vienna Convention on the Law of Treaties (VCLT), 1969 as the "rule of customary or international law"⁹ was further reaffirmed. Thus, it shall be appropriate to look for interpretation of public morals with the help of the rules laid down in the customary law.

Article 31(1)

Ordinary Meaning

According to Article 31(1) of the VCLT, interpretation of the treaty shall commence with the ordinary meaning of the term in question. The ordinary meaning of the term 'morals' can be derived from English Language Dictionary as the public moral exception was proposed by the US Government in 1946.¹⁰ 'Moral has been defined as "relating to, concerned with, the difference between right and wrong in matters of conduct" in the Universal Dictionary of the English Language.¹¹ Other English Dictionaries such as the Webster's New International Dictionary, the Black's Law Dictionary provide similar meanings of the term 'moral'. However, these dictionary meanings do not shed any light on the material content of the term i.e. which beliefs or principles should the term include.¹² Therefore, interpretation by the ordinary meaning does not give a clear meaning to the term.

Object and purpose

Article 31(1) further provides that for the interpretation of a treaty term, the object and purpose of the treaty shall also be taken into consideration. As provided in the Preamble of the GATT, The General Agreement strives to reduce tariffs substantially and promote non-discrimination in the international economic system, whereas the object of the Article XX is to justify the violation of the GATT obligations by providing general exceptions. Thus, the general exception under Article XX facilitates the member states to pursue other policies even at the cost of deviation from the obligations under the GATT. So, considering the dichotomy between the

⁶ United States – Standards for Reformulated and Conventional Gasoline [hereinafter referred to as US- Gasoline Case]

⁷ Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R (29 April 1996) at Page 22

⁸ FEDDERSON

⁹ US – Gasoline Case

¹⁰ Steve Charmovitz, The Moral Exception in Trade Policy, 38 VIRGINIA JOURNAL OF INTERNATIONAL LAW 6 (1998)

¹¹ Id

¹² FEDDERSON,

'object and purpose' of the treaty and that of Article XX, the interpretation of the term 'public morals' remains really farfetched.¹³

Context

VCLT also lays down that for the interpretation of a treaty term, the context of the term needs to be focused on. Apart from the public moral exception as provided under Article XX (a), Article XX contains nine other exceptions which provides for protection of human, animal or plant life; conservation of exhaustible natural resources; protection of national treasures; regarding products of prison labour that has been enumerated separately under different heads. Thus, it can be argued that the scope of public moral exception is independent of the other clauses and hence 'public morals' does not include the substance of the measures which can be justified under the other exceptions of Article XX.¹⁴ However, on the contrary it can be argued that there is possibility of overlap between the scopes of two clauses of the Article even though all the exceptions exist independently.¹⁵ For example, a trade restrictive measure relating to narcotics may fall under Article XX (b) for the protection of human health and at the same time it can also be brought under Article XX (a) for the protection of public morals.

Article 31 (2)

Article 31(2) states that while interpreting the treaty term, in addition to the text, the context shall also include agreements or instruments which have been entered between the parties in the relation to the conclusion of the treaty. However, for the original GATT 1947, there are no such agreements or instruments.¹⁶ Though there are certain agreements which have come up in the Uruguay Round that have been attached to the GATT 1994, none of them relates to the interpretation of the 'public morals.'¹⁷

Article 31(3)

Article 31(3), further provides that any subsequent agreement which has been concluded between the parties in connection with the interpretation of the treaty or application of the provision shall also be considered for interpreting the treaty term. However, there are no such agreements relating to the first clause of the Article XX.¹⁸ Thus, the general interpretative framework as laid down under Article 31 of the VCLT does not throw much light on the meaning of 'public morals.'

Article 32

When no authoritative interpretation can be concluded by considering Article 31 of the VCLT, Article 32 provides further aid by laying down supplementary means of interpretation by virtue of which the preparatory works of the treaty can be taken into consideration.

Preparatory work under Article XX

Professor Steve Charnovitz in his defining work on 'The Moral Exception in Trade Policy' has commented that there is not enough legislative history for Article XX (a).¹⁹ GATT was drafted during 1945 to 1948 during the United Nation Conference on Trade and Employment²⁰. It was the United States which for the first time projected the insertion of a public moral exception clause in the GATT in 1945, in order to allow the members to restrict trade on moral grounds.²¹ However, all subsequent drafts contained the same language of the exception i.e. "necessary to protect public morals" as was proposed by the US in the early stages of drafting.²²

¹³ CHARNOVITZ,

¹⁴ FEDDERSON

¹⁵ Id

¹⁶ CHARNOVITZ

¹⁷ Id

¹⁸ CHARNOVITZ

¹⁹ CHARNOVITZ

²⁰ SMITH,

²¹ CHARNOVITZ

²² WU

The drafters neither amended nor clarified the meaning of 'public morals'.²³ During the preparatory meeting of the Drafting Committee held in New York in 1947, a Norwegian Delegate elucidated that their country's restriction on importation, production and sale of alcoholic beverages were sheltered under the exception on public morals and health.²⁴ There was no further discussion on public moral clause which was finally integrated into the GATT and the final ITO Charter (Havana Charter).²⁵

Thus, this treaty could not provide any proper guidance on the term 'public morals.'

III. An Overview Of The Period 1948-2005

Though the public moral exception clause was incorporated into the GATT from the period of its inception, the clause lay dormant for almost thirty (30) years. Neither there was any major textual clarification on the interpretation of public morals by the treaty negotiators, nor there was any dispute regarding the clause before the WTO Dispute Settlement Body which could provide for a possible meaning of the term.²⁶ Thus, the clause was left in the same state as it was included in the General Agreement. The first six rounds of the global trade negotiations which continued from 1949 to 1979 did not witness any address on public moral exception clause by the negotiators.²⁷ It was in 1986, in the Uruguay Round, the public moral clause received some attention.²⁸ During this round, a new agreement aimed at liberalisation of trade in services was drafted in which an exception clause similar to that of Article XX (a) was included. The agreement named '**General Agreement on Trade in Services**' provide for an exception to its obligation for the protection of public morals or the maintenance of public order under Article XIV (a).²⁹ Further, a footnote to the clause provided that the public order exception can only be invoked in circumstances where there is a genuine and serious threat to "**one of the fundamental interests of the society.**"³⁰ The explicit provision of public order defence in GATS and the simultaneous absence of such an exception in GATT mean that the trade in goods can be restricted by invoking only public moral defence while trade in services can be limited by invoking both the public order and public moral defence.³¹ However, though there was a lack of textual clarification and judicial interpretation on the issue and 'public morals' remained an ambiguous term, but still it assumed a significant place in several international agreements. Professor Mark Wu, in his eminent work, focussed on several treaties that included the public moral exception clause.³² For instance, the **Stockholm Convention** establishing the European Free Trade Association in 1960; the North American Free Trade Agreement (NAFTA) and the Treaties establishing Free Trade Zones in the Association of South East Asian Nations; The South African Development Community and the Caribbean Community.³³ The public moral exception also occupied a major place in the Bilateral Free Trade Agreements but such agreements either inserted the GATT exception directly into the treaty or formulated an exception identical to the GATT exception. The parties did not contribute anything towards any possible interpretation of the term.³⁴ Countries like USA, South Korea and Honduras banned pornography while on the other hand some countries banned narcotics.³⁵ Since these grounds were universally accepted as moral grounds, there was no challenge relating to such restrictions. However, there were even some controversial restrictions like Israel banned the importation of all non-kosher meat products, Indonesia restricted the importation of alcohol and United States imposed ban on products Made by indentured child labour on the grounds of public

²³ Id

²⁴ SMITH

²⁵ CHARNOVITZ

²⁶ WU

²⁷ Id., 220

²⁸ WU

²⁹ GATS, ARTICLE XIV (a) : "necessary to protect public morals or to maintain public order"

³⁰ GATS, Footnote to Article XIV (a) : "The public order exception may be invoked where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society."

³¹ SMITH, 747

³² WU

³³ WU,

³⁴ Id

³⁵ WU, 223

morality.³⁶ But in none of these cases the States were required to justify such act due to the absence of any challenge by any other states.³⁷

Thus, we can conclude by saying that, in the absence of any jurisprudence regarding this issue, the public moral clause occupied a place in the academic world where scholars and academicians debated for a wider interpretation of the term 'public morals' to accommodate into it labour rights,³⁸ gender equality,³⁹ human rights.⁴⁰ A dynamic interpretation for the purpose of incorporating such concepts within the exception clause was suggested by the scholars.⁴¹ Even the United Nations High Commissioner for Refugees (UNHCR) opined that the public moral clause should also envisage human rights norms and standards.⁴² Some scholars also argued that public morals might include measures to curb child labour practices.⁴³ These arguments continued for long in the academic field and will continue until a clear and proper interpretation is given to the term.

IV. U.S. – Gambling: The Creation Of 'Public Morals

Clause' Jurisprudence

The very first WTO dispute to feature the public morals exception clause is the case of US-Gambling, which provides a useful insight into the meaning of 'public morals.'

Relevant Facts and Issues

In this case, Antigua and Bermuda challenged the US ban on cross border supply of gambling and betting services and alleged that US has violated its GATS obligation by implementing the US Federal Wire Act, Travel Act and Illegal Gambling Act.

US invoked the defence under Article XIV (a) of the GATS and argued that such Acts were necessary to protect public morals and public order within the meaning of Article XIV (a)⁴⁴. It contended that such ban was necessary as remote supply of gambling and betting services posed serious threat for organised crime, money laundering, fraud and other criminal activities including risk to children and particularly health risks.⁴⁵ Antigua challenged US arguments and pointed out that US had not submitted any evidence which could prove that Antigua's gambling industry involved organised crime nor did it submit any evidence to prove that Antigua was not co-operating with US in the criminal investigation and prosecution by the US.⁴⁶ Moreover Antigua also pointed out the existence of age verification and other technologies to reduce underage gambling.⁴⁷ Antigua submitted that such a verification system was less restrictive on international trade than a total prohibition.⁴⁸ Therefore, Antigua argued that US ban could not be said to be 'necessary' in order to protect public morals and maintain public order.⁴⁹

³⁶ Id

³⁷ Id

³⁸ Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J.S MALL & EMERGING BUS. L. 131, 169-71 (1999)

³⁹ Liane M. Jarvis, Note, *Women's Rights and Public Morals Exception of GATT Article 20*, 22 MICH.J.INT'L L. 219, 236-37 (2000)

⁴⁰ Salman Bal, *International Free Trade Agreements and Human Rights: Reinterpreting Article XX of the GATT*, 10 MINN. J. GLOBAL TRADE 62, 78 (2001)

⁴¹ WU

⁴² Id

⁴³ Anjali Garg, *A Child Labour Social Clause: Analysis and Proposal for Action*, 31 N.Y.U.J INT'L & POL. 473, 526 (1999)

⁴⁴ Panel Report, *United States- Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (10 November 2004)

⁴⁵ US- Gambling

⁴⁶ Id

⁴⁷ US - Gambling

⁴⁸ Id

⁴⁹ US – Gambling

On November 10, 2004 the WTO Panel for the first time made a pronouncement on the public moral exception clause.

Observation of the PANEL

The Panel observed that in order to prove that measures is provisionally justified under the exception clause, it first needs to satisfy that:-

- The measure is designed to protect 'public morals' or to maintain 'public order' and
- Such a measure is 'necessary' to protect public moral or to maintain public order.⁵⁰

While justifying that the measure is designed to protect public morals under Article XIV (a) of GATS, the Panel defined public morals as **"standard of right and wrong conduct maintained by or on behalf of community or nation."**⁵¹ Moreover, it also stated that the concept of public morals **"can vary in time and space, depending upon a range of factors including prevailing social, cultural, ethical and religious values."**⁵²

The Panel concluded that prohibitive measures on gambling and betting services include its supply by internet, could fall within the ambit of Article XIV (a). However, the Panel ruled in favour of Antigua and observed that US failed to provisionally justify that the trade restrictive measures were necessary to protect public morals or public order as it should have exhausted the 'WTO consistent alternatives' before imposing a 'WTO consistent measure'.⁵³

Observations of the APPELLATE BODY

On appeal the Appellate Body upheld the Panel's findings that the measures fall within the scope of 'public morals' or public order under Article XIV (a) of the GATS. It however did not review the Panel's view on the term 'public morals'.⁵⁴

In relation to the Panel's findings that the US statutes were not necessary within the meaning of the GATS, the Appellate Body reserved the Panel's observations.⁵⁵ The Panel's decision was based on the observation that US failed to take part in the consultation with Antigua.⁵⁶ The Appellate Body held that consultation does not constitute a reasonably available alternative measure to the United States.⁵⁷ Moreover, on account of Antigua's failure to identify a reasonably available alternative measure, the Appellate Body held that the statutes were 'necessary' and justified under the Article XIV (a).⁵⁸ Further, the Appellate Body observed that the US ban has failed to satisfy the requirements of the chapeau of the article as it did not demonstrate that the prohibition embodied in the measure applied to both foreign and domestic suppliers of gambling and betting services.⁵⁹

Critical Analysis of the US Gambling Decision

US - Gambling is one of the most important cases in the WTO jurisprudence. It clarified three important doctrines related to the issue of the 'public morals'. Such clarifications are laid down below:-

i) Dynamic interpretation of the term 'public morals'

In absence of any jurisprudence relating to this clause, it was not clear whether the clause should be interpreted dynamically or a static interpretation should be given.⁶⁰ But a number of scholars pushed for a dynamic interpretation of the term. The WTO Panel in this case stated the content of public morals and said that

⁵⁰ Id

⁵¹ Id

⁵² US – Gambling

⁵³ Id

⁵⁴ Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R (7 April 2005)

⁵⁵ US – Gambling

⁵⁶ Id

⁵⁷ US – Gambling

⁵⁸ Id

⁵⁹ US – Gambling

⁶⁰ WU

it can vary in time and space depending on the number of factors including the prevailing social, cultural, ethical and religious values, hence giving a dynamic interpretation to the clause.⁶¹

ii) Interpretation of 'necessary' element

The public moral exception clause both under the GATT and GATS contains the 'necessary' element by virtue of which a measure designed to protect the public morals can be justified under the exception clause only if it is necessary to protect 'public morals'. In analysing the necessary test, the Panel in this case referred to the Appellate Body decision in the Korea Beef case⁶² and the EC-Asbestos case⁶³ which provided a 'weighing and Balancing test' for the purpose of ascertaining whether a trade restrictive measure is necessary or not.⁶⁴ The Panel laid down three criteria for determining whether a measure is necessary to protect public moral. They are as enumerated as under.

a) "The importance of interests or values that the challenged measure is intended to protect."⁶⁵

The Appellate Body in the Korea Beef Case suggested that if the value or interest pursued is considered important, the probability of the measure being considered 'necessary' is much higher.⁶⁶

b) "An extent to which the challenged measure contributes to the realisation of the end pursued by that measure."⁶⁷

The Appellate Body in Korea Beef Case also suggested that greater the extent to which the measures contribute to the end pursued, higher is the chance of the measure being necessary.⁶⁸

c) "The Trade impact of the challenged measure including the availability of a WTO consistent alternative measure."⁶⁹

The Appellate Body in the Korea Beef Case further suggested that the lower the trade impact, likelihood of the measure being necessary is more.⁷⁰ The Appellate Body further clarified that since consultations are a process which may lead to uncertain results, therefore, it cannot be considered to be an alternative.⁷¹ Moreover, it was also clarified by the Appellate Body that the burden of proof first lies on the party challenging the trade restrictive measure to identify a 'reasonably available alternative measure', when the restrictive measure is challenged on the ground that it is not necessary.⁷² Once such alternatives are identified the burden shifts back to the responding party to prove, that the measure is still necessary. If the respondent is able to prove that the alternative is not reasonably available in view of the interests and the values the measure pursues to protect and level of the protection desired by the respondent, it will consequently lead to the conclusion that the trade restrictive measure is 'necessary'.⁷³

iii) Non discrimination: Reaffirming the need to comply with the 'chapeau'

The Appellate also clarified that the public moral exception clause must satisfy the requirements of the chapeau of the Article which lay down that a measure should not be applied in a manner that

⁶¹ US – Gambling

⁶² Appellate Body Report, Korea – Measures Affecting Import of Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R (11 December 2000) [hereinafter referred to as Korea Beef Case]

⁶³ Appellate Body Report, European Communities- Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R (12 March 2001) [hereinafter referred to as EC Asbestos Case]

⁶⁴ US – Gambling

⁶⁵ Id

⁶⁶ Korea Beef Case

⁶⁷ US – Gambling

⁶⁸ Korea-Beef

⁶⁹ US – Gambling

⁷⁰ Korea – Beef

⁷¹ US – Gambling

⁷² Id

⁷³ US – Gambling

results in arbitrary and unjustifiable discrimination.⁷⁴ The Appellate Body observed that US failed to meet the requirements of the chapeau. But to reach to such a conclusion the Appellate Body did not consider the actual discrimination but rather looked into United States' failure to establish that the measures were applied in a non-discriminatory manner.⁷⁵

Unanswered Questions

Though the US Gambling case provided clarification to the above principles, there are still certain unanswered questions which are as follows:

- **The first question which has not been addressed in this case is which morals are public morals?**⁷⁶ On one hand there lies the **unilateral approach**, whereby the member states can freely define their own 'morals' and on the other hand there lies the **universal approach**, whereby the member states invoking the trade restrictive measures needs to prove that the measure is based on a universally acknowledged public moral.⁷⁷ However both the approaches are not appropriate. In the first case of unilateralism, wherein the States can restrict trade on 'morals' defined by themselves, the states will try to bring everything within the purview of such morals and evade the obligations under GATT.⁷⁸ On the other hand, universalism may render the clause ineffective as only a few moral principles will qualify as 'public morals' as perception of people vary from one state to another.⁷⁹ Accepting the universal approach will also invalidate the trade restrictions of several countries which are not based on a universally accepted public moral. For instance, the importation ban on alcohol in several Muslim Countries will not suffice this test as prohibition on alcohol consumption is barely a moral though it is so in the Muslim Countries.⁸⁰ In this case, the Panel did not accept the Universalist Approach, as it stated that, "**Members should be given some scope to define and apply for themselves the concepts of 'public morals' and 'public order' in their respective territories, according to their own systems and scales of values.**"⁸¹ However the Panel while determining whether the ban on gambling services can be said to protect public morals, it carefully examined the practice in the other member states like Israel and Philippines to come to the conclusion that gambling activities do fall within the scope of public moral exception.⁸² Thus, it can be said that the Panel did not rely on the unilateral approach. It however, did not clarify what should be the correct method to determine what public morals are.
- **The second answered question is what evidence is required to show that a state legitimately holds a public moral?** Whether the trade restrictive measure is just the creation of the legislature of the state or is it based on the perception of the people has not been answered. The United States referred to only legislative reports, statements before the Congressional Committee hearings and the Congressional Record.⁸³ It did not provide any evidence to reveal that the morals in question are generally accepted by the people of the States.⁸⁴ The Panel observed that the public morals depend on the prevailing values but it did not provide any procedure to prove that a value is really prevailing in the State.⁸⁵
- Last question which remains unanswered is **what should be the basis on which the WTO Dispute Settlement Body would balance the interests between protecting the morality of the state and the rights of another to free trade** has also not been clarified.

⁷⁴ GATT & GATS, Chapeau to Article XX & XIV: ".....measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the countries where the same conditions prevail, or a disguised restriction on international trade....."

⁷⁵ US – Gambling

⁷⁶ WA

⁷⁷ SMITH

⁷⁸ WU

⁷⁹ Id

⁸⁰ WU

⁸¹ US – Gambling

⁸² Id

⁸³ US – Gambling

⁸⁴ WU

⁸⁵ WU

V. China-Audio Visual: An Explanation Of The Public Moral Clause

The **China Audio-Visual** case is the **first case which invoked the public moral clause as provided under Article XX (a) of the GATT**. This case is the outcome of a Chinese decision that required the foreign publications and the audio visual products to be screened by the state run companies of China to censor the goods which seemed offensive to the Chinese public morals.⁸⁶ Publication such as books and newspaper, periodicals, audio and video products including CDs, DVDs and games and music downloading services were channelled through those state run companies.

Relevant Facts and Issues of the case

United States challenged China's restrictions on imports, distribution and failure to afford national treatment to the imported products.⁸⁷ US further contended that China violated the responsibilities imposed under its Accession Protocol and Working Party Report that enumerates the trading rights commitments of China.⁸⁸ United States claimed that China has violated such commitments by refusing to permit any foreign enterprises or foreign individuals to import the products, but permitting only the state owned Chinese enterprises to import the products.⁸⁹

China challenged these arguments and stated that such system for selecting importation was necessary to protect the public morals of the country as it provides effective mechanism to review materials that depict violence and pornography.⁹⁰ China asserted that the screening responsibility given to the state owned enterprises were justified under the public morals exception clause under Article XX (a) of the GATT and also the Accession Protocol and the Working Party Report.⁹¹ However United States further challenged such arguments by holding that the measures taken by China were not 'necessary' to protect public morals as there were 'reasonable available WTO consistent alternatives.'⁹² It further provided that the screening of the imports could also be conducted by foreign enterprises by developing the expertise by training the existing personnel of such of such foreign enterprises or hiring experts.⁹³ China countered these arguments by holding that the measures were necessary with respect to the high level of protection as desired to afford to its public morals⁹⁴ and it also opined that the alternative cited by the US was not a reasonably available alternative as according to China the foreign enterprises would not understand the concept of Chinese morals and as they were not registered according to China's laws and regulations, the enterprises couldn't be held liable for their failure to conduct such review of offensive materials.⁹⁵

On August 12, 2009, the WTO Panel for the first time made a pronouncement on "public morals" exception clause of Article XX (a) of the GATT.

Observation of the Panel

In order to examine China's defence under Article XX, the Panel considered two-tiered analysis of the Article XX. **First**, determining whether the trade restrictive measures are designed to protect public morals and whether such measures are 'necessary' to protect such public morals, and **second**, determining whether China's restrictions comply with the requirements set forth in Article XX's Chapeau.⁹⁶ While analysing China's defence, the Panel used the same public morals definition as laid down in US-Gambling and applied the same

⁸⁶ Panel Report- Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-Visual Entertainment Product, WT/DS363 (12 August 2009)

⁸⁷ China Audio-Visual Case

⁸⁸ Id

⁸⁹ China Audio-Visual Case

⁹⁰ Id

⁹¹ China Audio-Visual Case

⁹² Id

⁹³ China Audio-Visual Case

⁹⁴ Id

⁹⁵ China Audio-Visual Case

⁹⁶ China Audio-Visual Case

interpretation accorded to it in the said case.⁹⁷ The Panel further explained that since Article XX (a) uses the same concept as Article XIV (a) and as it did not see any reason to differ from the interpretation of 'public morals' developed by the Panel in US- Gambling, it took the same interpretation for analysing Article XX (a).⁹⁸ For examining whether the Chinese measures were necessary to protect public morals, the Panel used the framework laid down collectively in the US- Gambling and Korea-Beef Case relating to Article XX (b), which observed that in order to determine whether a measure is 'necessary' relevant factors, particularly the importance of the interests or values pursued by the measures and its trade restrictiveness must be looked into by the Panel. Further consideration must also be given to any possible alternatives which may be less trade restrictive.⁹⁹ Panel observed that the alternatives proposed by the United States, that the content review be conducted by the foreign enterprises, was a reasonably available alternative to China and Chinese measures were not necessary to protect the public morals of the country.¹⁰⁰

Observation of the Appellate Body

On appeal the Appellate Body upheld the observations of the Panel and held that the Panel's analysis on whether the measures were necessary was correct as there were less trade restrictive measures available to China as pointed out by the US.¹⁰¹ The Appellate Body however did not review the use of the definition of public morals as laid down in the US Gambling Case.

Critical Analysis of the China Audio-Visual Case Decision

The Panel in the China Audio-Visual Case used the same interpretative framework of the public morals as was pronounced in the US Gambling Case. It did not provide any further clarification on the meaning of the term 'public morals' only to the extent of stating that the public law exception under Article XX (a) Of the GATT and that of Article XIV (a) Of the GATS has the same concept. Thus the questions which remain unanswered in this case which were the first case invoking Article XX (a) exception under the GATT.

VI. Difference Between Public Morals And Public Order

The term 'public morals' have been interpreted as **"standard of right and wrong conduct maintained by or on behalf of community or nation"**¹⁰² in the US – Gambling Case, whereas according to the Panel 'public order' refers to the **"preservation of fundamental interests of a society, as reflected in public policy and law."**¹⁰³

There is no such clear definition of 'public morals' in any international agreements, as a result the interpretation given in the US – Gambling is highly useful. Now, if we analyse the above interpretation, then it can be said that public order takes within its ambit the protection of public security.¹⁰⁴ It includes the prevention of those acts that may culminate in to public riots and public disorder.¹⁰⁵ On the other hand public morals are said to be the beliefs which are deeply rooted in a particular culture.¹⁰⁶

Article XX (a) of the GATT provides for the protection of public morals, whereas, Article XIV (a) of the GATS provides for the protection of public morals or the maintenance of public order.

The inclusion of the public order exception in the GATS in the Uruguay Round in 1986 and its absence in the GATT is significant and can be construed to give a narrow interpretation of the term 'public morals'. It can be

⁹⁷ Id

⁹⁸ Id

⁹⁹ China Audio-Visual Case

¹⁰⁰ Id

¹⁰¹ Appellate Body Report, China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-Visual Entertainment Products, WT/DS363/AB/R (21 December 2009)

¹⁰² US – Gambling

¹⁰³ Id

¹⁰⁴ SMITH,

¹⁰⁵ Id

¹⁰⁶ SMITH

said that public morals includes those grounds which cannot be justified under 'public order'. The Panel in the US – Gambling case observed that the “public morals” and “public order” are two distinct concepts under Article XIV (a) of the GATS; however there can be an overlap between the two as the concepts seeks to protect largely similar values.¹⁰⁷

VII. Conclusion:

The public moral exception to free trade is arguably quite important enough that the original drafters of the world trade 'constitution' listed it in the list of several exceptions to the principles of providing unfettered access to trade privileges. But for 57 years the exception remained dormant – utilized but never formally explicated. Only recently did the doctrine re-emerge in the US - Gambling decision. The birth of this doctrine has generated such an excitement that the WTO finally gave greater consideration within its jurisprudence to morality related issues such as human rights. This is evident by virtue of the position of the public moral clause in the Article XX of the GATT. Public moral clause has been placed at the top of the 'laundry list' of the General exceptions. Moreover, several countries invoke this exception clause frequently to restrict trade on the grounds of morality. While the emergence of public moral clause doctrine is welcome, but we should not be over optimistic as the doctrine as laid out in US – Gambling is only in the nascent stage. Nevertheless, several questions still remain unanswered and they seek further reconsideration on the matter. The first difficulty was in defining 'public morals' which is evident from both policy and textual perspectives. After all, its better that we progress too slowly and not tap the full potential of this newly emerging doctrine, than to move too fast in the wrong direction and unintentionally weaken the entire system.

Amongst 148 WTO Member States, 'public morals' could mean anything from religious views on drinking alcohol or eating certain food to cultural attitudes towards pornography, free expression, human rights, labour norms, women's rights or general cultural judgments about education or social welfare. What one society defines as public morals may have little relevance on another, at least outside or certain core of religious or cultural traditions. A broader interpretation of the term should not be given; as such interpretation may leave room for illegal protectionism. Moreover, Panels while inquiring trade restrictive measures on public moral should not look into domestic laws to check whether the State has adopted equal mechanism to protect such morals. In this period of emerging trade, it is important to eliminate the deficiency in the clause and put forward a more coherent interpretation of the term 'public moral.'

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¹⁰⁷ US - Gambling